Waterway and Wetland Handbook
CHAPTER 100
PONDS, ENLARGEMENT AND GRADING

GUIDANCE PURPOSE AND DISCLAIMER

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Purpose

The state has recognized that lands near or adjacent to navigable waters hold a special relationship with respect to water quality and other public rights. The main purpose of this statute is to protect navigable water from adverse effects caused by connected enlargements, grading, and ponds.

Mechanism

Section 30.19, Wis. Stats., requires a person to obtain a permit prior to enlarging any navigable waterway, creating any artificial waterway within 500 feet of a navigable waterway, creating a water course with intent to ultimately connect to a navigable waterway, or grading in excess of 10,000 square feet on the bank of any navigable waterway.

History

Section 30.19, Wis. Stats., was created by Chapter 284, Laws of 1961. At that time, Section 30.19 only applied to enlargements connected to navigable water. In 1963, Chapter 313 added permit requirements for projects within 500 feet of a navigable watercourse, grading in excess of 10,000 square feet on the bank, and ultimately connecting an artificially created waterway to an existing navigable watercourse. Chapter 313, Laws of 1963, also provided permit exemptions for the repair of public highways, agriculture use of land, and constructing projects in counties with more than 500,000 people. A penalty section was also added to the statute.

Chapter 148, Laws of 1965, added notice requirements to include the property owner's association or five persons living along the affected body of water. Provision was also made for the granting of a permit without a hearing, when no objections were received.

Chapter 273, Laws of 1971, added the requirement that a project must not cause environmental pollution as defined in section 144.01(3), Wis. Stats. No changes have been made to this statute since 1971.

The overall effect of these changes has been to substantially broaden the regulatory control of the Department under section 30.19, Wis. Stats. The original intent of the statute was to control only directly connected enlargements of navigable water sources. Prior to 1961, a connected enlargement could be constructed with no state authority, but the created watercourse became public provided the connection was navigable and legal public access was available. Unconnected ponds built prior to 1961 needed no state approval and are considered private waterways. The major effect of the current language in S. 30.19 is to require permits for many previously exempt projects, and to explicitly provide that permitted projects become public waterways.

Statutory Standards

Section 30.19, Wis. Stats., provides that the Department must make the following findings prior to issuing a permit:

a. The project will not injure public rights or interest.

b. The project will not cause environmental pollution as defined by section 144.01(3), Wis. Stats.

c. The project conforms to platting and sanitation laws.

d. No material injury will result to the rights of any riparian owner on any affected waterway.

Section 144.01(3), Wis. Stats., defines environmental pollution very broadly, and includes any act resulting in adverse impacts to the interests mentioned in s. 144.01(3). These interests specifically include the preservation of water quality.

Administrative Code Standards

Administrative rules directly applicable are NR 340, which governs the permitting of lowland sand and gravel operations, and NR 130, which governs mining. NR 340 provides definitions of terms commonly used in connection with Section 30.19, Wis. Stats., detailed guidance on the data requirements for any sand, gravel, or quarrying operation requiring a Chapter 30 permit; and bonding, requirements for those operations.

Local flood plain ordinances and NR 116 provide guidelines on allowable floodway and flood fringe uses and define the allowable backwater from a project. NR 116 will usually be applied to determine the backwater effect caused by spoil disposal in the floodway and the adverse impact on adjacent property owners.

County shoreland ordinances and NR 115 closely relate to erosion control by regulating the amount of clear cutting permitted along the shoreline. They state that no more than 30 feet per 100 feet of shore frontage shall be clear cut for a depth of 35 feet inland from the OHWM. Many counties require special exception permits for certain filling, grading and enlarging actions in or near navigable waters.

NR 1.95 establishes general standards to be applied by the Department in decisions affecting wetlands. The Department shall consider proposals which require its approval with the presumption that wetlands are not to be adversely impacted or destroyed and that the least overall adverse environmental impact shall result.

NR 150, Wis. Adm. Code, establishes procedures for determining whether a given project requires an Environmental Impact Statement (EIS). Connected enlargements are Type II actions, while unconnected ponds and grading in excess of 10,000 square feet are Type III actions.

Legal and Administrative Opinions

1. The definition of agricultural exemption includes the raising and harvesting of food and fiber crops, livestock and dairy farming. Agriculture does not include aquaculture, silviculture, pisciculture, or processing of raw agricultural products (BLS opinion 12/21/76).

2. The applicability of Section 30.19, Wis. Stats., with respect to municipal or industrial wastewater treatment facilities is restricted to cooling water ponds. Section 30.19 does not apply to sewage lagoons, clarifiers, digesters, activated sludge tanks, grit chambers, trickling filters and chlorine contact tanks because they are not artificial waterways within the meaning of Section 30.19, Statutes (BLS Opinion 7/16/76).

3. After a Section 30.19, Statute, permit has been issued the enlargement (connected or unconnected) becomes public water. Any access by the public must be legally obtained. In other words, the dedication of an enlargement to public waters does not authorize trespassing over private lands to reach those public waters. (Some sand and gravel projects authorized under Section 30.19 and NR 340 have included public access requirements.)

   The applicant should also be aware than since the enlargement is now public water, any further enlargement, dredging or new construction that changes the authorized dimensions of the enlargement will need a Chapter 30 permit. (BLS Opinion 11/9/76).

4. An unconnected pond built before 1961 is a private waterway. Connected enlargements built before 1961 did not require permits, but are considered public waterways if the connection is navigable in fact. (BLS Opinion 3/24/76).

5. Ponds constructed for agricultural purposes are exempt from 30.19, Wis. Stats., regulation. These ponds are private waterways unless directly connected to a navigable waterway. Even if an agriculturally exempt pond is later converted to a nonexempt use, it remains private, provided no additional work is done on the pond. However, the pond loses its 30.19 exemption if it is converted to nonagricultural use and additional work is done on the pond. (BLS Opinion 12/21/76).

6. NR 340.02(2) defines bank as "the land surface abutting the bed of any navigable water body which, either prior to any project or alteration of land contours or as a result of the proposed project or alteration, slopes or drains without complete interruption into the water body." This definition has never been interpreted in a legal opinion, administrative opinion, or court decision above the county court level.

7. NR 340.02(13) defines ultimate connection as "the joining of a waterway to an existing body of navigable water below the elevation of the latter's ordinary high water mark where the joining is by means of an open channel having a bed and banks." This definition has been further interpreted in the 4/29/82 Roden to District Directors memorandums).

8. An artificial lake crated by enlarging or damming a navigable stream is automatically a public lake, even though the flowed lands remain privately owned. A lake or pond created by enlarging a nonnavigable stream is private, unless the enlargement required a 30.19, Wis. Stats., permit, or the enlargement became public through prescriptive use by the public. (64 OAG 146, 1975). (OAG 52-75.)

9. Section 30.19 applies to all artificially created watercourses within 500 feet of the OHWM of any navigable body of water. The fact that the artificially created water body is perched or diked is irrelevant. (BLS Opinion 7/11/72.)

10. Plans for dams on nonnavigable streams may be approved as part of the 30.19 approval process (if applicable). (BLS Opinion 9/28/72.)

11. Unconnected ponds built prior to 1963 did not require any state permit authority. However, if the pond is within 500 feet of a navigable body of water, the dredging of such a pond after 1963 would require a 30.19 permit, unless the pond is agriculturally exempt. In addition, construction of a dam on the outlet of such a pond would also require a 30.19 permit. In either of these cases, the originally private pond would become public water upon issuance of the 30.19 permit. (BLS Opinion 1/9/73.)

Process

Notice Requirements: Any project requiring a Section 30.19 Wis. Stats., permit must be noticed according to s. 30.19(3). The Department must mail copies of the notice to the clerks of the municipality and county where the project is located, and at least five persons living along the affected waterway or the Secretary of a property owner's association (30.19(2)(c)). Although the statute requires the Department to notify the Department of Health and Social Services, they no longer regulate the platting laws, so this requirement is moot. If no objection to the application is received, we may grant the permit without a hearing. If an objection is received, the application must be set for hearing in accordance with s. 31.06, Wis. Stats.

Field Investigation

The scope of the required field investigation depends upon the complexity of the project. If the project involves commercial extraction of sand, gravel or rock, the requirements set forth in NR 340 apply. This requires the applicant to supply more information than for an ordinary project.

I . Unconnected Ponds

Unconnected ponds should be analyzed to determine if they are in the floodway or flood fringe of a stream. If the pond is in the flood fringe or out of the flood plain entirely, and the spoils will not be deposited in the floodway, the requirements of NR 116 will be met, although a local zoning permit may be required. If the spoils will be placed or dikes constructed in the floodway, a determination of backwater must be made. This determination will require that the applicant submit an accurate scale drawing of the spoil disposal site. A cross section through the pond extending across the entire width of the flood plain must also be included. The location and elevation of the spoil disposal area must be shown on this cross section.

Sometimes a field investigation will be sufficient to determine if a project will be outside of the floodway. Bridges or known constrictions in the floodplain are often useful aids when determining floodways. Horizontally, the floodway will contract at approximately a 45 degree angle to get through the constriction and will expand at about a 14 degree angle after the constriction. In other words, after the constriction the floodway will expand one foot for every four feet of stream. If the spoil deposits or berms will be outside the expansion or contraction, NR 116 will be satisfied. If a field investigation is insufficient, the applicant should submit a full valley cross section, and an engineering determination of the backwater effects must be made.

See the training material on Bridges, Chapter 80, Design Considerations Section 2. Hydraulic Review for a description of necessary data to complete a hydraulic review.

If the project's impact on flood elevations exceeds 0. 1 foot, the local ordinance (if there is one) must be amended and agreement reach with all affected landowners. Note that some ordinances require amendments for any increase. (See attached Roden memo of 2/l/82 for details on permissible legal arrangements)

Points of concern which should be addressed in the permit review process include:

a. Fish and wildlife impacts of the project.
b. Pollution impacts of enlargement (See Section 144.01(3), Wis. Stats., NR 104 and N$ 102).
c. Hydraulic impacts of spoil disposal.
d. Conformance of the project with sanitation and land platting requirements in Chapter 236, Wis. Stats.
e. Aesthetic impacts of the project (no standards currently exist; value judgment involved).
f. Wetland location and project consistency with NR 1.95.
g. County zoning requirements.
h. Potential for connection of the pond due to bank washout.
i. Adjacent land use and riparian property owner concern.

2. Connected Waterways

Connected waterways have the potential for serious detrimental effects. Because of the connection, pollution in an enlargement may move directly into the main body of water. Points of concern which should be addressed in the permit review process include:

a. Fish and wildlife impacts of the project.
b. Pollution impacts of the enlargement (See Section 144.01(3), Wis. Stats., NR 104 and NR 102).
c. Hydraulic impacts of spoil disposal or dike construction.
d. Other possible hydraulic effect of the enlargement including the potential for stream realignment because of the project.
e. Conformance of the project with sanitation and land platting requirements.
f. Aesthetic impacts of the project.
g. Impacts of constructing the enlargement;
    1. Maintenance of the junction between the natural water body and the enlargement.
    2. Debris buildup potential in the enlargement.
h. Aquatic nuisance problems.
i. Expansion of riparian rights to previously nonriparian landowners.
j. Wetland impact and project consistency with NR 1.95.
k. Possible breach of lake bed seal, leading to water level reductions.
1. County zoning requirements.
m. Stability of project; will it last with reasonable maintenance?
n. Impact on the use of the main waterway.
o. Adjacent land use and riparian property owner concern.

Some of the above items may have application to unconnected ponds and should be applied accordingly.

3. Grading

a. Slope Angle

Selecting a stable slope angle for the proposed new bank is very important and will vary depending upon the soils at the site and the intended use of the area. A good indicator of the suitability of the proposal is the surrounding slopes of the stable and unstable areas.

The less cohesive the materials, the flatter the required slope. The stability of a cohesionless sand is dependent only on slope, while the stability of a cohesive material depends upon slope and the vertical height. Generally the maximum slope which would be allowable is 2:1. Further information is available in the Department handout on shore protection.

b. Erosion control

The amount of erosion which can be expected is dependent upon the contributing drainage area, the slope of the embankment, particle size and the amount of rainfall. One or a combination of the above may dictate the need for some of these erosion control methods:

1 . Straw bales used as check dams
2. Seeding & mulching
3. Earthen dikes
4. Excelsior matting (artificial woven erosion control mats)
5. Gobi mats (perforated concrete mats through which vegetation can grow)
6. Gabions (rock-filled wire baskets)
7. Sodding
8. Diversion ditching or sedimentation ponds
9. Leaving a buffer strip of vegetation

Erosion control is most important during spawning and egg incubation seasons; if possible, work should be scheduled for less sensitive times. The best time for grading from an erosion control standpoint is when the surrounding vegetation is most lush (RJK). Further information may be found in "Environmental Do's and Don'ts on Construction Sites" published by the U.S. Soil Conservation Service.

4. Fishery

If the applicant is planning to develop a fishery in the enlargement through stocking, consideration should be given to the potential for intermingling of the stocked fish with any existing native fish populations during periods of high water or through escape. Such stocking would require permits pursuant to Sections 29.52 or 29.535, Statutes, and NR 19.05, as applicable.

In connected enlargements, losses of fish can occur due to low oxygen periods. Even in cases where movement of fish is not physically blocked, connected enlargements lacking circulation, such as long lagoons, can suffer oxygen depletion and winter kill. Summer algae die-offs in connected lagoons in fertile lakes have also been documented to cause oxygen depletion and summer kill conditions.

In connected enlargements where the water level in the main water body fluctuates significantly, the enlargement should be constructed so that its bottom slopes toward the connection (preferable) or is level, thus reducing potential for entrapment during low water.

In unconnected enlargements, the potential for fish entrapment must be considered. If it appears probable that fish will be washed into the impoundment, consideration should be given to requiring an easement for public access to fish the impoundment. This situation is specifically addressed in NR 340.05(d).

Final Disposition

The permit should specify exactly what is being authorized. The allowable time frame for the project must be included in the permit. All erosion and pollution control measures the applicant is expected to employ should be listed. If the project is authorized under NR 340, bonding requirements, progressive reclamation plans and final reclamation plans must be referred to in the permit. In all cases, reference should be made to the final application to indicate exactly what plan the Department has approved. Any plan for maintenance dredging should be included in the permit, or further proceedings under 30.20 will be required.

Any person objecting to the decision issuing or denying a permit may seek judicial review by serving and filing a petition in accordance with the provisions of sections 227.15 and 227.16, Stats., within thirty (30) days of the decision date.

Monitoring and Enforcement

For gravel pits, see NR 340. All permitted projects should be examined at least upon completion to determine compliance with the permit. Projects permitted under NR 340 should be checked by the water manager according to the schedule outlined in that code.

Violations of s. 30.19, Wis. Stats., are punishable by a fine not to exceed $1,000, as provided by s. 30.19(b). This fine may be imposed by action of a local court. In addition, the Department may ask for restoration of the site under s. 23.79(3), Wis. Stats., which allows a judge to require restoration as part of a civil action brought by the Department. The Department also has the option to proceed under s. 30.03, in which case a hearing examiner may order restoration, but not monetary damages.

Education

There are four pamphlets produced by the Department which should be useful in educating the public on s. 30.19, Wis. Stats., related matters:

> Saving Your Shoreline discusses proper design of riprap. This may be necessary as part of shore stabilization in an enlargement project.
>
> Wisconsin's Water Regulation Programs Work For You provides a general outline of the water regulation permit program.
>
> Public or Private I - Navigability discusses the concept of navigability and how it affects private rights.
> Public or Private II - The Ordinary High Water Mark discusses the relationship of the OHWM to private property rights.

There are two sample drawings available for 30.19 projects, "Pond Application Information Requirements" and "Connected Enlargement Information Requirements". Both of these drawings contain sample drawings and information requirements for ponds and connected enlargements respectively.

Sources and Products for Coastal Engineering and Erosion Control (DNR) provides a convenient list of supplies of geotextiles, sheet piling and other products for shore protection and erosion control.

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: April 29, 1982 FILE REF: 3534

TO: District Directors

FROM: Robert W. Roden - WRZ/5

SUBJECT: Program Guidance on Fish Hatchery Construction #30.19 Permit Requirements

The subject of permit requirements for the construction of fish hatchery ponds has arisen in several Districts recently. Most of the problem is centered around the definition of "pond" and "ultimate connection". This memo is an interpretation of previous legal opinions for the purpose of determining jurisdiction over hatchery operations.

If the project is not within 500 feet of a navigable waterway, 30.19 regulation is only possible under the "ultimate connection" theory. Ultimate connection is defined in NR 340.02(13) as follows: "Ultimate connection means the joining of a waterway to an existing body of navigable water by means of a natural drainage course or an open or closed conduit, either of which tend to confine and direct flow into the existing body of navigable water."

Regulation under "ultimate connection" requires that:

1. The receiving body of water is navigable.

2. The connection is either by means of an open channel, conduit, or existing watercourse.

3. The constructed waterway is similar to a natural pond. A "waterway" must have some element of potential public use, and does not include concrete swimming pools, sewage lagoons, clarifying ponds, industrial wash ponds, or concrete or steel fish tanks either in ground or above ground. For more information, see the July 16, 1976, legal opinion on this subject.

The constructed waterway must be directly connected to the receiving body of water or we lack jurisdiction. If the applicant simply proposes to run a pipe out of the fish holding area onto the ground, this would not constitute an "ultimate connection" unless the pipe discharges directly into a navigable body of water, or the pipe discharges into an existing watercourse.

Two final points are important. Fish ponds are not considered agriculturally exempt. The latest restatement of this position may be found in 12/12/76 legal opinion by Jim Kurtz, which affirms a 9/11/66 opinion denying agriculturally exempt status to fish ponds. Finally, fish ponds producing less than 20,000 lbs. of fish per year are exempt from WPDES requirements (see Section 122.43 of Volume 43, No. 111 of the Federal Register for details).

In summary, fish hatcheries within 500 feet of navigable waters will be regulated if they have the character of a natural pond. Hatcheries more than 500 feet from navigable water will only be regulated if they are directly connected to navigable water via an open channel, or else meet the "ultimate connection" test as outlined above.

RWR:DH:sm

cc: George Meyer - ADM/5
Mike Cain - LEG/5
Area Supervisors
Dick Knitter - WRZ/5
Ed Brick WRZ/5

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: May 13, 1982 FILE REF: 3500

TO: Dale Lang - North Central District

FROM: Robert W. Roden - WRZ/5

SUBJECT: Clarification of Various Matters Relating to Enlargements of Waterways and Ponds

You have asked a variety of questions regarding the interpretation of terms in Section 30.19, Wis. Stats., and regarding the definition of "pond".

Your first question is, "What is the definition of agricultural use of land as specified in Section 30.19?" As I indicated to you, we attempted to establish a definition of agricultural use by administrative rule (Chapter NR 340) but were unsuccessful in obtaining the approval of the legislative review committees. I think that for the purposes of our current administration of Section 30.19, the term "agricultural use of land" should be construed in the broadest manner possible.

As I understand the legislative history of Section 30.19, the agricultural exemption was originally intended to allow plowing of land adjacent to streams. However, as you know, administrative practice since Section 30.19 came into being has been substantially more broad than that. Most recently, the Department and representatives of agriculture reached an agreement on the overall concept of "agricultural use of land" in the original version of AB 839. The major distinction was between actions to bring new lands into production as opposed to improvement of existing agricultural land. We did not attempt to precisely define what specific uses of land constitutes agriculture.

The issue which appears to be most troublesome is the exemption of ponds under Section 30.19 on the premise that a pond is not an area of land. I believe that this is too narrow a construction of the statutory intent, and that it ignores over 15 years of administrative practice. While the pond itself may arguably not be a land feature (I believe you would find many people who would disagree with that contention), it is the use of land that the pond contributes to which is of primary importance. Obviously, an irrigation pond enhances the use of land for growing crops. In the same manner, stock watering ponds contribute to the use of land for pasturing and raising of livestock. Particularly with the extensive history of administrative practice along these lines, I do not believe that it is fruitful to seriously question this approach.

I believe that the discussion of "agricultural use of land" also generally answers your question about what types of activities fall under the agricultural exemption. I suggest that you bring specific questions to our attention as they occur.

You also ask whether a permit under Section 30.19 should be required for dredging any artificial watercourse or whether Section 30.20 should prevail. We have consistently held that dredging is regulated under Section 30.20 and that activities <u>above</u> the ordinary high-water mark are regulated under Section 30.19. A 30.20 permit should be required for dredging an artificial waterway which has already received a Section 30.19 permit or where the waterway is connected to a navigable stream. It would be appropriate to consider using Section 30.19 to regulate alterations of waterways within 500 feet of a navigable body of water but which have not previously received a Section 30.19 permit.

You also ask what constitutes a pond. I believe that any pond must meet the definition in Hoyt v. City of Hudson. In other words, a pond must have a discernible bed and banks (this means that it must have a detectable ordinary high water mark).

I have discussed these responses with Mike Cain, and he concurs with them. I have not requested a formal legal opinion since many of the issues are policy matters or have already been dealt with by the Bureau of Legal Services.

RWR:jkb

cc: George Meyer - ADM/5
Water Management Coordinators
Mike Cain - LEC/5
Dick Knitter - WRZ/5
Ed Brick WRZ/5

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: March 19, 1985 FILE REF: 3550

TO: District Directors (WMC)

PMMS Response:
Insertion: Chapter 100 Water Regulation Handbook

FROM: Scott Hausmann - WRZ/5

Distribution: Program Staff

SUBJECT: Interpretation of NR 302 Pond Maintenance

Lake Michigan District has raised the question whether or not a s. 30.20 dredging permit can be issued to clean out an old dug pond lying within 400 feet of the Pike River which has been designated as a wild river in NR 302. This administrative rule was developed to establish a management program for designated wild rivers in the state. More specifically, NR 302.04(3) prohibits dredging from the bed of a wild river (s. 30.20 permit), and enlargements (s. 30.19 permit) within 400 feet of the wild river.

The specifics of the District's situation are these:

1. The pond was dug prior to 1961, which was the year s. 30.19, Wis. Stats., was enacted for first permitting enlargements.

2. The pond is considered to be connected to the river and is a public waterway.

3. The pond is not considered to be part of the bed of the wild river.

Specific language of NR 302.04(3) is:

> "No dredging of materials from the bed of any wild river shall be permitted, nor shall channels be connected to a wild river, nor shall an pond or enlargement be permitted within 400 feet of the ordinary highwater mark of any wild river."

The key phrase in this situation is "bed of any wild river." An argument could be put forth is that if the pond is not considered part of the bed of the river, a s. 30.20 dredging permit could be issued. However, past legal opinions have made it clear that both connected and unconnected artificial ponds built prior to 1961 within 500 feet of a navigable stream would require a s. 30.19 enlargement permit if any work is done after enactment of the law (BLS Opinion 9/9/73, BLS Opinion 7/16/76). Subsection 30.19(l), Wis. Stats., requires a permit whenever a person desires to " ... construct, dredge or commence to do any work with respect to any artificial waterway, ... pond, lake or similar waterway where the purpose is ultimate connection with an existing navigable stream, ... or any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing navigable stream…." The law does not require a retroactive permit for a pond built prior to 1961, but the intent is to require a s. 30.19 permit if any work is done after 1961.

For this case, if we consider a s. 30.20 dredging permit permissible because the pond is not part of the bed of the wild river, it still requires a s. 30.19 permit which are not permissible under NR 302.04(3). The intent of this rule is to minimize activities within 400 feet of the wild rivers. Under the existing NR 302, we can't allow any permit under 30.19 or 30.20 for this work.

Reviewed by:

Scott Hausmann
Mike Cain
Richard Vogt

SH:RV:cb

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: May 6, 1985 FILE REF: 3550

TO: District Directors (WMC)

PMMS Response
Put in: Chapter 100, Water Regulation Handbook

FROM: Robert W. Roden - WRZ/5

Distribution: All Program Staff

SUBJECT: Interpretation of "Bank" in NR 340.02(2)

We have been asked to provide an interpretation of the definition of "bank" as stated in s. NR 340.02(2), Wis. Adm. Code. NR 340.02(2) defines "bank" as:

> "...the land surface abutting the bed of any navigable water body which, either prior to any project or laceration of land contours or as a result of the proposed project or alteration, slopes or drains without complete interruption into the water body."

The reason for defining the term "bank" in NR 340 is to identify those areas that may be subject to the permit requirements of 30.19(l)(c) for grading or otherwise removing top soil from the "bank" of any navigable stream, lake or other body of navigable water where they are exposed by such grading or removal will exceed 10,000 square feet.

This definition of "bank" can cover a wide array of situations and physical configurations. Because this definition is quite broad we have been asked to provide a clearer and more definitive interpretation to aid in the determination of when the requirements of s. 30.19, Stats., and NR 340, Wis. Adm. Code, apply.

We feel that additional clarification is gained through reexamination for the purpose of Ch. NR 340. Section NR 340.01 states:

> "It is recognized that serious degradation of water quality, fish and wildlife habitat, and public interests in recreation and scenic beauty may occur during and after the excavation, dredging or grading in or near navigable waterways. It is the purpose of this chapter to minimize the adverse effects caused during and after such activities, to provide for the expeditious rehabilitation of affected land, and to restrict excavation, dredging and grading where the adverse effects cannot be minimized or avoided."

"Bank" has purposely been defined in broad terms to allow application of the requirements of NR 340 and s. 30.19, Stats., to those projects that may appear to be quite remote to navigable waters by may still have serious impacts on those waters.

Problems in determining if the requirements of s. 30.19, Stats., and NR 340 apply to a specific project appear to involve the interpretation of the terms "any project" and "complete interruption" used in the definition of bank.

The term "any project" must be interpreted in the context of the sentence in which it is used. The language refers to the land area "prior to any project ... or as a result of the proposed project or alteration...". It is my opinion that this clearly means that we should determine the "bank" by inspecting the site as it exists at the time of an application. In the event of an after the fact permit (or enforcement action) we should determine what the site configuration was prior to the initiation of the project in question. If previous "projects" on the site, e.g., existing roads, dikes, etc., have “completely interrupted" the flow from this area, we should not consider this area as part of the "bank".

The term "complete interruption" means, in my opinion, that runoff from the area in question would be attenuated to such an extent that impacts to the water body are nonexistent or undiscernible. If runoff from a given area is delayed such that sufficient filtration, infiltration, sedimentation, or other attenuation occurs prior to the runoff reaching the adjacent water body and the effects of the runoff are nonexistent, the area should not be considered to fall within the definition of "bank". This determination will obviously have to be made on a case-by-case basis considering numerous vegetative and hydraulic factors.

Reviewed By: John Coke
Scott Hausmann
Mike Cain

RWR:JC:slh

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: February 17, 1987 FILE REF: 3550

TO: Jack Donatell - NWD

PMMS Response
Insertion: Chapter 100, Water Regulation Handbook

FROM: Scott Hausmann - WZ

Distribution: All Program Staff

SUBJECT: Interpretation of ss. 30.19(l)(c) and (d)

You have asked whether or not developers constructing roads for subdivisions (which would eventually be dedicated to a township) would be subject to the provisions of ss. 30.19(l)(c) if the township had an ordinance with strict road construction standards.

The only provisions in ss. 30.19 that would exempt road construction from the requirements of ss. 30.19(l)(c) are found in ss. 30.19(l)(d). The construction and repair of a "public" highway (which would include town roads) would be exempt from ss. 30.19. Although a road can be constructed for ultimate use by the public (i.e., town road), the exemption for construction pursuant to 30.19(l)(d) would not be applicable because the road was not in public ownership at the time of construction.

If the project is located within a county having a population of 500,000 or more, then section 30.19 would not be applicable at all.

In summary, the development of a road for a subdivision prior to dedication to a municipality would be subject to the provisions of ss. 30.19(l)(c).

PSH:DS:el

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: February 17, 1987 FILE REF: 3500

PMMS RESPONSE
Insertion: Chapter 100, Water Regulation Handbook

TO: District Directors
Bob Hansis - SD

Distribution: All Program Staff

FROM: Scott Hausmann - WZ

SUBJECT: Interpretation of ss. 30.19(l)(d)

You have asked whether soil erosion control practices, which are specifically intended to maintain soil productivity for agricultural production, are considered agriculturally exempt pursuant to ss. 30.19(l)(d).

Soil erosion control practices specifically intended to maintain soil productivity for agricultural production would include but are not limited to streambank sloping, seeding and/or sodding, riprapping, spoil spreading (to dispose of borrowed material onto adjacent agricultural land), to level, smooth or improve landscape quality for crop production, floodwater retarding structures, surface water diversion structures, grade stabilization structures, grassed waterways.

The three instances you cite are:

1. Streambank sloping, excess of 10,000 square feet;

2. Erosion control structures ("dams" constructed on gullies that are not considered watercourses and not subject to Chapter 31, but are constructed within 500 feet of a navigable stream); and

3. Grading in excess of 10,000 square feet for the purpose of obtaining topsoil for agricultural use.

In the context of maintaining soil productivity and preventing soil loss, streambank sloping has for the most part been an integral part of streambank protection projects such as riprap. Because most streambank protection projects aid in stabilizing a stream channel, prevent upland soil loss, reduce non-point source pollution and aid in the continued use of agriculturally productive land, it is our opinion that "agricultural uses of land" as defined in ss. 30.19(l)(d) includes streambank sloping projects when the purpose is to maintain the soil productivity and prevent soil loss from adjacent <u>agricultural</u> lands (emphasis added).

Similarly, erosion control structures (dams as identified above) should also be construed as agricultural uses of land, where the purpose of the structure is to prevent upland soil loss from adjacent <u>agricultural</u> lands (emphasis added). These structures will not, except during dam failure, adversely impact waters of the state. More often than not these structures benefit water

quality by reducing nonpoint source pollution and in some cases create additional wetland habitat. Therefore, erosion control structures constructed for the purpose of maintaining agricultural soil productivity and preventing soil loss can also be an exempted activity pursuant to ss. 20.19(l)(d).

The use of topsoil from the banks of a waterway (referred to as spoil material) for the enhancement of agricultural land and associated use would also be considered an agricultural use of land and therefore exempt pursuant to ss. 30.19(l)(d).

Although it is our opinion that these practices are exempt, there may be unique situations where these practices are not for the benefit of adjacent riparian agricultural lands or cause environmental damage. These unique situations warrant applying jurisdiction pursuant to section 30.19 or other applicable statutes when abatement of a nuisance is being sought.

In summary, the language "agricultural use of land" should be construed to exempt soil erosion control practices for agricultural land from the requirements of ss. 30.19(l)(a), (b) and (c).

SH:DS:el

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: April 6, 1987 FILE REF: 3500

TO: District Directors

Insert: Chapter 100, Water Regulation Handbook

FROM: Robert W. Roden - WZ/6

SUBJECT: Applicability of Section 30.19(l)(b), 30.19(l)(a) and NR 340 to Rotten Granite Extractions

Recently, Scott Hausmann wrote a memo detailing the applicability of several sections of section 30.19, Wis. Stats., and NR 340 to "rotten granite" extractions. While I believe that rotten granite mining is somewhat unique to the North-Central District, many of the items addressed within Scott's memo are applicable to other extractions on a stateside basis. I am, therefore, attaching Scott's memo and suggest that it be distributed to all holders of the Water Regulation Handbook. T'his memo should be considered as a program guidance and inserted within Chapter 120 "dredging" of tile Handbook.

RWR:KJ:slh
Attachment
9493H

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: March 17, 1987 In Reply Refer To: 3500

TO: Mitch Zmuda - Antigo

FROM: Scott Hausmann - WZ/ 6

SUBJECT: Interpretation of Statutes, Rotten Granite (Grus) Mining, Non-Metallic Mining Adjacent to Water of the State.

You have requested clarification of the Department's and Corp's jurisdiction relative to rotten granite mining in Marathon County. It is our understanding that this information will be used in a report that you are preparing which will assess the environmental impacts of rotten granite mining and recommend a course of action for the NCD in coping with this particular problem. Because the situation is very specific to grus mining in Marathon County, this memorandum will address those specific issues you described-in your September 19, 1986 memorandum to Bill Smith and subsequent conversations you have had with Dale Simon.

Background Information

Grus mining is a non-metallic mining process for extracting weathered granite which is usually located within an aquifer. As a result, the area to be mined must be dewatered. Dewatering is usually accomplished in one of two ways. Those are:

1. During the mining process, the grus is removed while excavating a pit. The water within the pit is removed using sump pumps which then discharge the water into an artificially constructed waterway, then to a non-navigable waterway, and eventually ending up in a navigable waterway. In some cases, the water is pumped into a non-navigable waterway ultimately draining into a navigable waterway or the water may be pumped directly into a navigable waterway.

2. A deep ditch or channel is constructed through the mine area to dewater the grus deposits by providing a mechanism for groundwater to be removed from the system as rapidly as possible. These channels extend a substantial distance downgradient from the mining area, ultimately connecting with a navigable waterway similar to that described in #1 above.

In both instances, the water being discharged is generally intermittent. The discharges are not usually associated with a high precipitation event because it is groundwater that is being disposed, not diffused surface water. The discharged water is typically turbid and has a high colloidal suspension of sediments. Eventually, these sediments are transported to a continuously flowing watercourse, non-navigable or navigable, where they settle and change the natural rocky, cobble and gravel substrate to one of primarily sand and fines. This reduces macro-invertebrate habitat and eliminates desirable spawning habitat for some fish species. In the case of Freeman Creek, the changes in habitat attributed to the degradation of water quality caused by grus mining could effectively eliminate any spawning habitat for trout.

Additional anticipated biological, physical and chemical impacts are described in your September, 1986 memorandum.

Considering the background information previously described, our response to your questions are:

1. Question. Can we assert s. 30.19(1) (b) authority for rotten granite ponds connected to Freeman Creek via man-made channels and non-navigable tributaries when ponds are beyond 500 feet from navigable waters?

   Response. s. 30.19(l)(b) would only be applicable if the connection from the pond to the navigable waterway was direct. Specifically the connection into the navigable waterway would be below the OHWM providing a continuous connection between the enlargement and the navigable waterway. It is our opinion that assertion of state jurisdiction under s. 30.19(l)(a) could be successfully argued if the discharge was to a non-navigable waterway which ultimately connected to a navigable waterway. The adverse impacts that have occurred on Freeman Creek as a result of the artificially constructed ponds and channels associated with the mining would strengthen the Department's ability to regulate these activities.

2. Question. Can we use s. 30.19(l)(c) for grading on the bank when a rotten granite excavation is contributing sediment to navigable water via man-made channels and non-navigable tributaries? The excavations are 500 to 1000 feet from the navigable waters.

   Answer. Although one could liberally construe the definition of "bank" as defined in NR 340.02(2) and therefore assert jurisdiction pursuant to s. 30.19(l)(c) Stats., our experience is that this liberal definition of 'bank' has not been well received in the courts. Refer to the May 6, 1985 Program Guidance memo by Bob Roden (Interpretation of Bank).

   Therefore, we would advise that s. 30.19(l)(a) be applied to this situation for the same reasons explained in Answer #1.

3. Question. Does NR 340 apply to rotten granite excavations when a Chapter 30 permit is required.

   Answer. Yes. In our opinion, the extraction of rotten granite (a weathered rock) falls within the purview of MR 340 if a permit pursuant to Ss. 30.19, 30.195, and/or 30.20 Stats. is required.

4. Question. Due to the terms "sand, gravel or rock excavation" in NR 340.01, are we limited to using the code f or those specific materials or can we use the code for clay, silt, peat or humus mining?

   Answer. NR 340 would not be applicable to the materials you described in Question 4 because this code is directed specifically at sand, gravel or rock extraction. However, definitions in NR 340.02 should be used for the Department's administration of all activities regulated pursuant to ss. 30.19 and 30.195, and for all dredging permits or contracts associated with the extraction of sand, gravel or rock regulated by s. 30.20, Stats.

5. Question. What jurisdiction would the Corps have in this matter relative to the Clean Water Act, Sections 401 and 404?

   Answer. The key to your question is whether or not the discharge of sediment laden water, associated with grus mining, into a waterway falls within the jurisdiction of the Corps for depositing fill, into waters of the nation or the EPA (DNR assumed program.) for a WPDES permit for a point source discharge. Based upon our understanding of how the deposit is made into a waterway, the deposit of sediments would be most appropriately regulated as a point source discharge subject to regulation under Chapter 147 Stats. It is our opinion, that the discharge of sediment laden water would not be subject to the provisions of section 404 because that program requires the direct deposit of material into a waterway, much like our s. 30.12, Stats., does. In fact, some general WPDES permits have already been issued for

the discharges associated with grus dewatering operations. It is our recommendation that you consult with your area environmental engineer and review the conditions of any existing permit to see if a change is warranted.

The WPDES requirements would have to comply with minimum water quality standards and associated WQ certification criteria.

If you have any other questions regarding the above information, please contact Dale Simon at 608- -9868.

Reviewed by: Dale Simon
Robert Sonntag
Michael Cain

SH:Jah-
54180

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: May 6, 1987

In Reply Refer to: 3500

TO: District Directors

PMMS Response
Put in: Chapter 100, Water Regulation Handbook

FROM: Scott Hausmann - WZ/6

Distribution: All Program Staff

SUBJECT: Navigability of Artificial Ponds

The question has been asked "when does an artificially constructed pond which extends onto public land (township road easement) become a public waterway?" We were also asked how the issues of 1) ultimate connection, 2) location within 500 feet of an existing navigable waterway, and 3) the date of original construction influence the jurisdiction of the State.

All of the above issues were in regard to the construction of a private fish hatchery.

Our original draft response to your request has recently been altered by the Hearing Examiner's decision on an application to construct a connected enlargement for the purpose of raising and selling fish. "Aquaculture" has been ruled as an agricultural use of the land, therefore, exempt pursuant to s. 30.19(l)(d) Stats. For this exemption to apply, the facility must have a private fish hatchery license or be eligible to be licensed as a private hatchery [see s. 29.52(4), Stats.].

Because of the Examiner's decision, the pond you cited in your request is considered a private body of water, even though the pond is located, in part on a town road easement.

The only way the pond could become considered a public waterway is through prescriptive use by the public (see 640AG 146, 1975) or if the original use of the pond changed to a non-exempted use requires the pond to be permitted pursuant to s. 30.19 Stats.]

In this particular situation, with the road on an easement, any action by the public must be reasonably related to highway purposes. A person could stand or wade on the bed of the waterway within the right-of-way and engage in such passive activities as bird-watching or enjoyment of scenic beauty. More active pursuits such as boating or fishing are probably not permissible in this or similar cases. In fact, the pond owner could legally construct a fence along his property line to prohibit entrance and use of the pond by the public. On the other hand, if the highway right-of-way was <u>owned</u> by the town, it would seem that members of the public could undertake any activity within the right-of-way which was not prohibited by the town as owner of the property, provided the activity did not unreasonably impair the property rights of the hatchery owner, or of any other owner of a private waterway.

Usually roadways that are utilized as a part of a pond, lake or flowage bank become more subject to damage and may eventually need repair. Knowing this, it would be reasonable to assume that the

township is either not aware that the project will flood public property or if they are, appropriate legal arrangements have been made by the township that would abrogate or mitigate any damages that could result from the flooding of the land controlled by the township.

The jurisdictional issues of 1) ultimate connection, 2) located within 500 feet of an existing navigable waterway, and 3) date of original construction can be clarified by reading Chapter 100 of the Water Regulation Handbook, BLS Opinion 7-16-76, BLS Opinion 12-21-76, 4-29-82 Program Guidance from Roden, 513-82 Program Guidance from Roden, 3-19-85 program Guidance memorandum from Hausmann, and the 4-6-87 Program Guidance from Roden. If you have any questions please contact Dale Simon at 608/267-9867.

Drafted by: Dale Simon
Requested by: Gloria McCutcheon
Reviewed by Bob Sonntag
Michael Cain
Bob Roden

54310

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: January 8, 1988 FILE REF: 3500

TO: District Directors (WMC)

PMMS Response
Insertion: Chapter 100, Water Regulation Handbook

FROM: Scott Hausmann - WZ

Distribution: WRZ Program Staff
District Director (Water Access Coordinator)

SUBJECT: Public Access Requirements - ss. 30.19 and 236.16(3), Stats., Relationship

Attached is an opinion of the Attorney General (OAG-69-87) on applying statutory public access requirements to artificial lakes created within 500 feet of the ordinary high watermark of a navigable stream.

SH:el
Attach.
Drafted By: Attorney General

Requested by: Gloria McCutcheon

State of Wisconsin **DEPARTMENT OF JUSTICE**

December 23, 1987 OAG 69-87

Mr. Carroll D. Besadny
Secretary
Department of Natural Resources
101 S. Webster Street
Madison, Wisconsin 53702

Dear Mr. Besadny:

You have requested my opinion whether statutory public access requirements apply to artificial lakes created within 500 feet of the ordinary high water mark of a navigable stream. You state that a subdivision developer proposes to create two artificial ponds within 500 feet of a navigable stream; your request does not state whether the developer proposes to connect the artificial ponds to the navigable stream. For the reasons which follow, I conclude that an artificial waterway connected with or located within 500 feet of a navigable water is a public waterway to which public access must be provided pursuant to sections 236.16(3) and 30.19(l)(a) and (5), Stats.

Section 30.19 (1)(a) provides:

> Enlargement and protection of waterways. (1) PERMITS REQUIRED. Unless a permit has been granted by the department or authorization has been granted by the legislature, it is unlawful:
>
> (a) To construct, dredge, commence or do any work with respect to any artificial waterway, canal, channel, ditch, lagoon, pond, lake or similar waterway where the purpose is ultimate connection with an existing navigable stream, lake or other body of navigable water, or where any part of such artificial waterway is located within 500 feet of the ordinary high-water mark of an existing navigable stream, lake or other body of navigable water.

Section 30.19 (4) authorize the department to issue a permit upon a finding:

> that the project will not injure public rights or interest, including fish and game habitat, that the project will not cause environmental pollution . . . , that the project conforms to the requirement of laws for the platting of land and for sanitation and that no material injury to the rights of any riparians owners on any body of water affected will result . . . .

Section 30.19(5) further provides that "all artificial waterways constructed under this section shall be public waterways," and allows the department to condition permits as it finds necessary to "protect public health, safety, welfare, rights and interest and to protect private rights and property."

Section 236.16 sets forth mandatory layout requirements for subdivision plats, specifying minimum lot width, area and street width. Section 236.16(3) requires subdivisions abutting navigable lakes or streams to provide public access to the water as follows:

> (3) LAKE AND STREAM SHORE PLATS. All subdivisions abutting on a navigable lake or stream shall provide public access at least 60 feet wide providing access to the low watermark so that there will be public access, which is connected to existing public roads, at not more than one-half mile intervals as

> measured along the lake or stream shore except where greater intervals and wider access is agreed upon by the Department of Natural Resources and the department [of development], and excluding shore areas where public parks or open-space streets or roads on either side of a stream are provided. No public access established under this chapter may be vacated except by circuit court action. This subsection does not require any local unit of government to improve land provided for public access.

Your question concerns the interplay between sections 30.19 and 236.1693) and, in essence, asks whether proximity to navigable water converts what would ordinarily be a private lake into a public waterway.

In 64 Op. Att'y Gen. 146 (1975), my predecessor determined that section 236.16(3) does not apply to artificial lakes on private land created by the damming of a non-navigable stream, but specifically limited his opinion to situations not reached by section 30.19. He concluded, 64 Op. Att'y Gen. at 149, "[i]n this instance, to require public access to entirely artificial lakes where the common law confers no public rights would abrogate the common law." Of course, the difference between the facts you pose and the 1975 opinion is the intervention of section 30.19(5), which does abrogate the common law by declaring artificial waterways "public" if they connect to or are constructed within 500 feet of a navigable stream. I must next consider the extent to which the "public waterway" designation alters the private owner's property rights, and ultimately, whether the department may condition a permit on the owner's provision of "public access" to the water.

As a starting point for this analysis, I note that Wisconsin has long recognized an expansive definition of waters protected under the public trust doctrine established by Wis Const. art. IX, § 1. Under this doctrine, the state holds the beds of all navigable waters in trust for its citizens. Although the original purpose of the trust doctrine was to promote commercial navigation, the Wisconsin Supreme Court has expanded it to protect the public's use of navigable waters for purely recreational and nonpecuniary purposes. State v. Bleck, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); Muench v. Public Service Comm., (1952). Natural, navigable waters of this state are thus impressed with the public trust, and all citizens enjoy access to and the full use of these waters on an equal footing. Moreover, private individuals cannot secure title to a lakebed because that title belongs to the state. State v. Bleck, 114 Wis. 2d at 462.

At the other end of the spectrum, our supreme court has held in Mayer v. Grueber, 29 Wis. 2d 168, 176, 138 N.W. 2d 197 (1965), that the beds of artificially-created lakes do not belong to the state:

> In the case of artificial bodies of water, all of the incidents of ownership are vested in the owner of the land. An artificial lake located wholly on the property of a single owner is his to use as he sees fit, provided, of course, that the use is lawful.

On the resolution of private versus public lakebed ownership, the facts you pose fall somewhere in the middle. The lakebeds themselves are on private land, yet the close proximity to navigable water which triggers the operation of section 30.19 suggests that it is the connection or merging of shared waters that makes water a "public" resource. (There is no helpful legislative history to aid in construction of section 30.19.) Two Wisconsin cases further refine the boundaries of private and public lakebed ownership, and together suggest a result that protects public rights yet does not deprive the owner of a property interest.

In Hasse v. Kingston Co-operative Creamery Assoc., 212 Wis. 585, 589, 250 N.W. 444 (1933), the supreme court held that an artificial enlargement of a previously non-navigable stream does not confer public rights in the water, placing that case on the Mayer v. Grueber side of the ledger. In an earlier case, however, the court held that public rights attach to the increased surface water created by the artificial enlargement of a previously natural and navigable lake. Mendota Club v. Anderson and another, 101 Wis. 479, 493, 78 N.W. 185 (1999). Even though the public was entitled to the use of the newly-created surface water, ownership of the new lakebed remained in the private owner and did not transfer to the state. The Court reached this result with some rather pragmatic imagery:

> Certainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam.

Thus, according to Mendota Club, it is possible under Wisconsin Law to retain the underlying private ownership of the lakebed even though public rights attach to the new surface water. In my opinion, the facts you present are very close to the Mendota Club case: by virtue of section 30.19, the creation of an artificial lake connected or in close proximity to a navigable waterway creates public rights to use the surface water even though the artificial lakebed remains in private ownership. Support for this result appears in section 30.19 (5) itself, which declares that artificial waterways created under that section are "public"--but does not state that title to the bed vests in the state. In turn, the right to use a public waterway necessarily implies public access, since without it the right is meaningless.

Section 30.19(l)(a) requires a permit not only when an artificial waterway actually connects with an existing navigable water, but also when any part of the artificial waterway is located within 500 feet of the ordinary high water mark of a navigable water body. The statute does not reveal the basis for the 500-foot limit, but Wisconsin cases suggest that the state has a valid police-power purpose in regulating areas located in close proximity to navigable waters as well as connected waterways. In Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the court upheld a shoreland zoning ordinance which restricted the alteration of lands within 1000 feet of the ordinary high water mark of a navigable lake, pond or flowage. The court reasoned that the special relationship between lands within the 1000-foot buffer zone and the contiguous waterway warrants public trust protection:

> What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty.

Just v. Marinette County, 56 Wis. 2d at 16-17.

The court's recognition of a valid police-power basis for regulating lands in close proximity to navigable waters lends solid justification to the 500-foot limit in section 30.19(l)(a). In effect, even where an artificial waterway is not connected to a navigable waterway, close proximity creates a presumption of hydrologic connection. The Supreme court reaffirmed its Just v. Marinette County police-power analysis in M & I Marshall & Ilsley Bank v. Town of Somers, (slip op. at 14-16, November 4, 1987). Thus, the special relationship between navigable waters and lands adjacent to them provides ample basis for the 500-foot limit established in section 30.19(l)(a).

I am aware that recent United States Supreme Court cases consider the issue of whether condition property development on the grant of public access constitutes a taking in violation of the Just Compensation Clause of the fifth amendments. ("[N]or shall private property be taken for public use, without just compensation." Article V, Amendments to the United States Constitution). In Nollan v. California Costal Com'n, 107 S. Ct. 3141 (1987), the Supreme Court invalidated a public easement condition imposed upon a coastal development permit. The Court repeated earlier holdings that "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'" 107 S Ct. at 3146. In the Nollan case, however, the Court could not identify a legitimate state interest sought to be advanced by the lateral shorelines easement across the Nollan's property to enable the public to travel from one public beach to another. For example, the Court noted that it would see no problem in requiring an easement to permit the public to view the beach if preserving the public's view of the ocean were the state's asserted interest. "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" 107 S. Ct. at 3148.

The public access condition established by section 236.16 (3) easily meets the test established in Nollan v. California Coast commission. The purpose of a public access requirement is to protect the public's state constitutional right to use public waterways, and access is the sine qua non to the enjoyment of that right. It makes no difference how the waterway become public, whether by operation of law or through connection to a navigable water: the public access condition assures the public's right to use state waterways. The "legitimate state interest," therefore, is the protection of public rights in water, and, unlike the mandated easement in Nollan, requiring developers to provide public access to the shore advances that interest.

In Kaiser Aetna v. United States, 444 U.S. 164 (1979), the Court held a governmental public access requirement to a preexisting private pond to be a taking. In that case, however, the Court emphasized that under Hawaii law the pond had always been private property notwithstanding its connection to navigable water. More significantly, the Court noted that legitimate takings cases arise only where there is an interference with an "'economic advantage' that has the law back of it." Kaiser Aetna, 444 U.S. at 178. In Kaiser Aetna, the developers owned the pond and had exclusive access to it, at least until the government intervened and (after the owners had made costly improvements) declared that the developers must now provide public access. In contrast, under the facts you pose, the developer under section 30.19 has no "right" to created a lake within 500 feet of public waters, where it presumably would impact the quality and quantity of existing waters. The Kaiser Aetna court acknowledged:

> We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation.

Kaiser Aetna, 444 U.S. at 179.

Under section 30.19(4) and (5), the state has sufficient authority to deny the developer a permit in the first place without causing a taking. Thus, even under Kaiser Aetna the state certainly may condition its section 30.19 permit on providing public access to a newly-created lake which exists in close proximity to and may have impacts on existing public waters.

Accordingly, an artificial waterway connected with or located within 500 feet of a navigable waterway is a public waterway to which the department may require public access. If this requirement is imposed as a condition of a section 30.19 permit for the enlargement of waterways, it is not a governmental taking under the rationale of Kaiser Aetna and Nollan because the owner has not lost an essential element of a pre-existing property interest and the condition bears a reasonable relationship to the state's protection of public waters.

Sincerely,

Donald J. Hanaway
Attorney General

DJH:MS:bp
CAPTION: An artificial waterway connected with or located within 500 feet of a navigable waterway is a public waterway to which public access must be provided pursuant to sections 236.16(3) and 30.19(l) (a) and (5), Stats.

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: January 28, 1988 FILE REF: 3530-4

TO: District Directors (WMC)

FROM: Scott Hausmann - WZ/6

PMMS Response
Insertion: Chapter 100 Water Regulation Handbook
Distribution: WRZ Program Staff

SUBJECT: Mine Reclamation - Navigable Waters

We have been asked several questions regarding the following scenario: A mine has been abandoned for a number of years. The mine consisted of two ponds, a pit from which they removed the iron ore, and a tailings disposal area.

a) Since the mine has closed down, the open pit is filling with groundwater. This pit may or may not be within 500 feet of a navigable stream. This pit was never permitted under s. 30.19, Wis. Stats.

b) The two ponds are within 500 feet of a navigable stream and were properly authorized according to s. 30.19, Wis Stats.

c) The tailings disposal area is being reclaimed by vegetation.

Department staff are looking to develop the pit (lake) into a usable resource for the public, which raises the following questions:

1. Q: Will the pit (lake) be a public body of water if the land around the pit is privately owned?

   A: The answer to this question hinges on four criteria to determine if it is considered public or private water. These criteria are 1) when constructed, 2) connected or unconnected to navigable waters, 3) within 500' of navigable waters, and 4) constructed for agricultural purposes. The attached flow chart shows how these four criteria relate in the determination of public or private waters. It may be possible that certain facts of a specific case could dictate a different answer of public vs. private than that indicated on the flow chart.

   In the specific case that generated the questions discussed herein, a mining permit was issued under s. 144, Wis. Stats. Because the pit was authorized under s. 144.85, Stats., and the permit did not specify the pit as being authorized pursuant to s. 30.19, Stats., nor did it specify any public ownership or public right associated with the pit, the body of water within the pit would be considered private.

2. Q: Will the pit (lake) be a public body of water if the land is publicly (state or county) owned or there is a public access to the pit?

   A: If all the land abutting the pit became public the entire pit would become public. If only a portion of surrounding land became publicly owned then only that portion of the pit on public lands would be considered public waters. This assumes that the lands abutting the pit that become public include all or a portion of the bed of the waterway. It is possible, as stated in Mayer v. Grueber to convey upland on an artificial body of water without conveying the bed or riparian rights.

3. Q: Will the lake have to accrue use by the public for a period of time (20 years) before it is a public body of water? (In other words, when and how does this body of water become public?)

   A: No. The pit could become public through purchase of the property, connection to navigable waters by means of naturally rising water levels or through additional alteration requiring a permit under 30.19 if within 500' navigable waters.

4. Q: Fisheries is considering constructing rock reefs for fish in the pit. Will permits to dump rock in the pond be required? When will a permit become necessary considering the question of when this water becomes public?

   A: If the pit is considered private as discussed above, no permit to dump rock (30.12) is needed. If it is public as discussed above, a permit under 30.12 or M.C. 3565.1 approval would be needed. If further alterations are made requiring a permit under 30.19 permit and thus making the pit public waters, any subsequent structures would require a 30.12 permit or M.C. 3565.1 approval.

5. The overflow from the pounds entered the adjacent trout stream which resulted in an improvement of the trout fishery in the stream. Since shutdown, the stream's fishery has decreased because of the lack of water from the ponds entering the steam.

   a) Q: Will a permit (Wis. Stats. 30.195) or M.C. 3565.1 approval be required to divert water to the stream from ponds or pit via an underground culvert or open trench?

      A: Yes.

   b) Q: What about pumping water into these streams from either sources?

      A: If the source is private waters as determined above, no 30.18 permit or M.C. 3565.1 approval would be required. If the source is public, unconnected an involves an average of greater than 2,000,000 gallons per day in any 30 day period, a permit under 30.18(2) (b) or M.C. 3565.1 approval wold be required. Withdrawal from a public, unconnected source that exceeds a 30 day average of 100,000 gallons per day but is less than 2,000,000 gallons per day would require registration with the Department under Sec. 144.026(3) Wis. Stats.

   c) Q: What about allowing any overflow from the pit or ponds to enter the streams without any physical alterations?

      A: If due to natural events such as rising ground water levels or high precipitation, no permits would be necessary.

Drafted By: John Coke

Requested By: Ed Bourget

Reviewed By: Dale Simon
Mike Cain

JC:EB:bp

[Two flowcharts appear here:
Flowchart 100-1, Determining if an existing pond is public water
Flowchart 100-2, Proposed Waterway Contruction jurisdiction]

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: February 8, 1988 FILE REF: 3550
TO: District Directors(WMC)
PMMS Response
Insertion: Chapter 100, Water Regulation Handbook

FROM: Scott Hausmann - WZ/6

Distribution: Water Regulation Staff Bureau of Legal Services

SUBJECT: ss. 30.19 & 236.16(3), Stats., Public Access Requirements. Attorney General Opinion OAG-69-87.

Recently you were sent the referenced Attorney General's Opinion. Some confusion seems to exist about when and if the Department must require public access to artificial waterways permitted pursuant to s. 30.19, Stats.

The opinion of the Attorney General basically makes two conclusions:

1. The Department may require public access as a condition of a s.30.19, Stats., permit if warranted. We must articulate a basis for such a condition which shows, in the words of the Attorney General, that "the condition bears a reasonable relationship to the State's protection of public waters."

2. The public access requirements of s. 236.16(3), Stats., must be met if the property adjacent to a s. 30.19 permitted artificial waterway is subdivided under Chapter 236, Stats. Chapter 236 applies to subdivision of 5 or more parcels of 1 1/2 acres or less at one time or over a period of 5 years.

I hope this clarifies any confusion that might exist. If not, please contact me.

Drafted By: Scott Hausmann
Requested: Ed Bourget
Reviewed By: Michael Cain

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: October 10, 1988 FILE REF:

TO: District Directors (WMS)

PMMS Response
Insertion: Chapters 100, 110, 120,Water Regulation Handbook

FROM: Scott Hausmann - WZ/6

SUBJECT: Section 30.19(lm)(e) Exemption From Permit Requirements for Authorized Enlargements

1987 Wisconsin Act 374, the new Chapter 30, changed section 30.19 to allow for maintenance dredging of existing authorized enlargements. Now that we've has a little experience with this section several questions have come up which I'll address in this memo.

1. NR 340 regulates non metallic mining and specifies the requirements for review and permitting. How does this administrative code relate to the exemption for work required to maintain authorized enlargements found within section 30.19?

   All existing permits authorized under the old section 30.19 and NR 340 remain unaffected. The status of mining activities issued since adoption of the Act 374 will depend on how the permit was drafted. If the permit cited only section 30.19, the exemption found within section 30.19 is applicable and we could not require a permit for work required to maintain the original dimensions without revoking the original authority. You should note that section 30.07 allows for the revocation of Chapter 30 permits "for good cause".

   When appropriate, future permits for non metallic mining should include specific conclusions of law specifically state within the order section that additional permits are necessary for maintenance dredging of unconnected enlargements.

2. Section 30.07 restricts the length of permits to 3 years with the possibility for a 23 year extension. Section 30.20(2) allows the department to issue contracts and permits for up to 10 years. Since the two statutes conflict, the more specific language in s. 30.20 stats., governs for dredging permits. How will this affect permits issued under NR 340?

   Permits issued prior to the enactment of Wis. Act 374 are unaffected. Permits issued after the enactment are subject to these time frames and must be repermitted upon their expiration. If a permit contains a s.30.20, stats., permit or contract, we can use the longer time frames outlined in that statute.

3. Some harbors are or have been authorized by use of section 30.19. Can the Department retain authority over dredging operations?

   The exemption language within section 30.19 does exclude us from requiring a future permit but we should be able to draft permits to allow our continuing review. For example, a 30.19 permit could be conditioned with a requirement to notify the department of any future dredging and allow for a 30 day review period. I suggest that you use such a provision cautiously and coordinate with the bureau.

4. Some 30.19 permits issued before the enactment of Wisconsin Act 374 specified a sunset date within the permit. How are these permits affected by the exemption from permit for maintenance dredging found within s. 30.19 Wis. Stats.?

   We construe any permit limitations issued before the enactment of Act 374 as being valid and unaffected by the exemption specified in section 30.19(lm)(e). It would be unreasonable to assume that specific permit conditions, necessary to protect the water body involved, would be overruled by future statutes. A contrary assumption would force us to anticipate future legislation within the permit process. Therefore, an authorized enlargement with an expired permit date will be considered completed and will require new authorization before maintenance dredging can occur. If no expiration date was specified within the original 30.19 permit conditions, authorization for the enlargement must be considered "active" and the exemption found within s. 30.19(lm)(e) valid.

Reviewed by : Ken Johnson
Robert Sonntag
Mike Cain

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: August 18, 1992 FILE REF: 3500

TO: Water Management Supervisors
Water Management Specialists
Water Regulation Section
FROM: Ken Johnson - WZ/6
SUBJECT: Agricultural Uses of Land Relating to Fish Farming and Forest Harvesting

Several months ago Bob Roden asked the Department of Justice about the implications of the new agricultural definition found within the Lower Wisconsin River legislation. The new definition, now found within section 30.40(l), fails to include fish farming and forestry. Since recent administrative decisions use the definition within Chapter 91, use of the new definition represents a significant departure from the way we've done business.

Attached is the Attorney General's opinion in this matter which clearly states that section 30.40(l) is applicable. Agricultural use is defined as follows:

> "Agricultural Use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables and sod farming.

We may have some problems getting the word out to people who are in mid project. However, we ought to start asserting jurisdiction on 30.19 and 30.20 projects not covered by the above definition as soon as possible.

cc: Robert Roden - WZ/6
Scott Hausmann- WZ/6

Attachment

State of Wisconsin DEPARTMENT OF JUSTICE

March 8, 1990

CODE: I-12-90

Mr. C. D. Besadny
Secretary
Department of Natural Resources
101 South Webster
Madison, WI 53702

Dear Mr. Besadny:

You have asked whether the Department of Natural Resources must consider fish farming and forestry as "agricultural uses of land" for purposes of its permitting authority in section 30.19, Stats. Section 30.19 requires a department permit for the construction or enlargement of any artificial waterway which connects to or exists within 500 feet of a navigable waterway, but subsection (1m)(b) exempts "any agricultural uses of land" from the permit requirement. You point out that fish farming and forestry can have substantial impacts on navigable waters, and you add that the recently-enacted definition of "agricultural use" in section 30.40(l) fails to include fish farming or forestry.

For the reasons discussed in this opinion, I conclude that the department may narrowly interpret the agriculture exemption in section 30.19(lm)(b) to effectuate the resource protection purposes of chapter 30.

Prior to the enactment of section 30.40(l) (1989 Wisconsin Act 31), your department apparently concluded that its administration of the section 30.19(lm)(b) permit exemption was governed by the expansive definition of "agricultural use" contained in section 91.01(l). For purposes of farmland preservation, section 91.01(l) defines "agriculture use" as follows:

> (1) "Agricultural use" means beekeeping; commercial feedlots; dairying; egg production; floriculture; fish and fur farming; forest and game management; grazing, livestock raising; orchards; plant greenhouses and nurseries; poultry raising; raising of grain, grass, mint and seed crops; raising of fruits, nuts and berries; sod farming; placing land in federal programs in return for payments in kind; owning land, at least 35 acres of which is enrolled in the conservation reserve program under USC 3831 to 3836; participating in the milk production termination program under 7 USC 1446(d); and vegetable raising.

Section 30.40(l), however, defines "agricultural use" more narrowly:

> (1) "Agricultural use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables; and sod farming.

The answer to your question, then, turns on whether it is appropriate for the department to utilize this most recent definition of “agricultural use” in its administration of section 30.19 permits, or whether it is bound to the broad definition in section 91.01(1).

The same word is capable of different meanings in different statures and "(t)he ultimate scope of a term capable of a broad or narrow meaning in the in the abstract must be determined by its context in a particular instance." Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 271 N.W. 2d 69 (1978). Thus, even though a statute is not ambiguous, a word may have many meanings and "its precise meaning must be found in its context and relation to the subject matter." Empire Gen. Life Ins. Co. v. Silverman, 127 Wis. 2d 270, 277, 379 N.W. 2d 853 (Ct. App. 1985). And, as noted in Suburban State Bank v. Squires, 145 Wis. 2d 445, 449, 427 N.W. 2d 393 (Ct. App. 1988), "(w)hen multiple statutes are contained in the same chapter and assist in implementing a common object or policy, the statutes should be read in pari materia and harmonized."

A superficial reading of sections 30.40(1) and 30.19 would suggest that because both statutes reside in the same chapter, the section 30.40(1) definition of "agricultural use" should apply to section 30.19(1m)(b). In County of Dane v. Racine County, 118 Wis. 2d 494, 498, 347 N.W. 2d 622 (Ct. App. 1984), however, the court of appeals cautioned that statutory definitions cannot simply be superimposed on other statutory sections, even if they appear in the same chapter, if the statutory definition is limited to the specific section in which it appears. Thus, we cannot automatically apply the section 30.40(1) definition to section 30.19 (1m)(b) because it expressly applies to sections 30.40 to 30.49, dealing with the lower Wisconsin state riverway. Nor can we assume the applicability of section 91.01(1), as it is likewise expressly limited to chapter 91, "Farmland Preservation."

We may still, however, examine the subject matter and context of each of the definitions of "agricultural use" appearing in sections 30.40(1) and 91.01(1), to determine which dfintion the deparmtne may use in its administration of section 30.19. Chapter 30 concerns the protection of the state's navigable waters. As stated in Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 597, 412 N.W. 2d 505 (Ct. App. 1987), "(t)he free and unobstructed use of the state's navigable waters is a matter of statewide concern…. Chapter 30, Stats., regulates the area: Applying the narrow definition of "agricultural use" in section 30.40(1) to section 30.19 permit proceedings would advance the resource protection purposes of Chapter 30 by making the agricultural permit exemption unavailable to entities engaged in forestry and fish farming. Conversely, the expansive definition of "agricultural use" in section 91.01(1) is intended to advance farmland preservation, the objective of Chapter 91, and has little relationship to the protection of state waters.

Indeed, even in the absence of the newly created definition of "agricultural use" in section 30.40(1), I question whether the department, in light of the resource protection purposed of Chapter 30, should have presumed the applicability of the section 91.01(1) definition to section 30.19. Where the Legislature has intended the section 91.01(1) definition to apply, it has expressly so stated, as in section 71.58(3) and (4) and 20.29(3)(b).

Further more, if a statute contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed. Kimberly-Clark Corp. v. Public Service Commission, 110 Wis. 2d 455, 463, 329 N.W. 2d 143, 147 (1983)." Maxey v. Racine Redevelopment Authority, 120 Wis. 2d 13, 24, 353 N.W. 2d 812 (Ct. App. 1984). Moreover, I note that section 30.19(1m)(b) creates an exemption from the normal permit requirement for agricultural users. It is reasonable to assume that in the area of environmental protection—as in the context of tax exemptions—ambiguities in words granting an exemption are resolved against the person claiming the exemption. Kollasch v. Adamany, 104 Wis. 2d 552, 561, 313 N.W. 2d 47 (1981).

Accordingly, I conclude that the context of section 30.19(1m)(b), and the resource protection purposes of Chapter 30, allow the department to interpret the agricultural exemption narrowly, and to apply the section 30.40(1) definition of "agricultural use" to advance those puposes.

Sincerely,

Donald J. Hanaway
Attorney General

DJH:djs

GENERAL DESIGN GUIDANCE IN CREATING ARTIFICIAL PONDS OR WETLANDS FOR.WILDLIFE

Existing wetlands are usually self-sustaining ecosystems that should not be disturbed or altered to create ponds for wildlife. However, the construction of wildlife ponds can be done on upland sites or occasionally in lower quality wetlands where the wetland and wildlife values could be enhanced.

HIGHER QUALITY SITES THAT SHOULD GENERALLY BE AVOIDED INCLUDE:

Forested Wetlands, Cedar or Tag Alder Swamps, Bogs & Natural Shallow Water Wetlands.

LOCATIONS THAT MAY BE GOOD SITES FOR PROJECTS MAY INCLUDE:

Wet or Previously Drained Farm Fields, Transition Zones Between Uplands and Existing Wetlands & Existing Wetlands which Have Relatively Low Quality.

The following general design features should be considered when constructing a wildlife pond or artificial wetland basin.

1. SIZE. A pond or wetland basin should complement and improve the quality of the habitat that exists naturally at the project site. These projects can vary in size ranging from 0.1 to 2 acres. Keep in mind you will need to place the spoil material on an upland site and that many cubic yards of spoil are generated for even small pond projects. Side casting spoil material into an adjacent wetland area is not allowed because it buries wetland or aquatic plants, alters the hydrology and may destroy fish and wildlife habitat.

2. SHORELINE. An irregular shoreline should be constructed because it can increase the area used by waterfowl and other wetland wildlife species and may provide more isolated bays. Creating these bays, isolated from the rest of a pond, will attract more wildlife and allow them to do more of their daily and seasonal activities, including feeding, loafing, mating and nesting.

3. SHAPE & DEPTH. The bottom contour of a pond should be uneven and rolling. The variable water depths allow for more diverse emergent vegetation in shallow areas throughout the basin. Emergent plants growing in the shallow areas will filter sediment, take up nutrients, and improve water quality. This vegetation also provides food and cover for fish and wildlife. The water depth in shallow areas should vary between 6 and 18 inches and can range from about 4 to 5 feet in the deeper areas. A pond intended for fish will need to be deeper in some areas. A few small areas 10 to 12 feet deep are needed to maintain an adequate oxygen supply through the winter months.

4. SLOPE. The shoreline area should have a gentle slope and provide small vegetated "fingers" and open "bays" along the edge. Slopes should only have about a foot rise (vertical) for approximately every 8 to 10 feet of run (horizontal) . Vegetation growing in these edge areas will increase the amount of habitat. Projects with 50% open water and 50% vegetation cover in the wetland basin (including the emergent vegetation around the shoreline) will provide the greatest species richness and diversity.

5. UPLAND SITES. Ponds on some upland sites may require a clay liner to retain water. Topsoil should be placed on the bottom of these basins to provide a more suitable substrate and improve the establishment of aquatic plants and animals. Clay lined basins produce less vegetation, fewer invertebrates and support less waterfowl and other species, than those lined with both clay and organic soils.

6. ORGANIC SOILS. Muck soils that may be available from an impacted wetland can be placed on the bottoms and slopes of newly created basins. This material provides a natural seed bank and is high in organic

content which will provide for better plant species diversity and increased invertebrate (insect) activity. Invertebrates are an important food source for a variety of birds and mammals.

7. ISLANDS. Construction of small earthen islands within larger ponds or newly created wetland basins can increase diversity and provide offshore nesting areas for waterfowl and other wildlife. If islands are constructed, they should have a minimum distance of 120 feet from other shoreline areas to be most effective.

B. FOOD SOURCE. Following construction, a layer of hay may be placed in shallow areas along the shore as a food source for invertebrates and microorganisms which will help establish plant and animal populations more rapidly.

9. BUFFER AREAS. Buffer areas of upland grass vegetation may need to be established and maintained around the perimeter of these projects to provide the nesting habitat and cover needed by waterfowl. If mowing around the pond or basin is necessary to control woody vegetation during the growing season, it should be delayed until after August 1 to avoid disturbing nesting waterfowl, upland game birds and other wildlife.

POND/ENLARGEMENT WORKSHEET

Definitions

"Waterway" means any body of water declared navigable pursuant to s. 30.1 0, Stats.

"Ultimate connection" means the joining of a waterway to an existing body of public navigable water by means of a natural drainage course or an open or closed conduit, either of which tend to confine or direct flow into the existing body of public navigable water.

"Prescriptive right/easement" means a right to use another's property which is acquired by a use which is open, notorious, adverse and continuous for the statutory period. The statutory period is generally 20 years. (i.e. trespassing across private land to gain access to an abandoned gravel pit for swimming or fishing).

"Public access" means the right of passage of the public over the surface of common highways that abut navigable waters. (i.e. access gained from a town road ROW that abuts a navigable waterbody. Access to a stormwater management pond in a commercial parking lot would not necessarily constitute public use and accrual of prescriptive rights.

"Connect to" means the direct physical joining of a waterway to an existing body of navigable of water below the elevation of the latter's OHWM where the adjoining is by means of an open channel having a bed and banks.

"Environmental pollution" means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life. (See s. 299.01(4), Stats.)

Legal Exception is From Permit Requirements

1. **See s. 30.19 (1 m).**

a) The construction and repair of public highways.
b) Any agricultural uses of land (i.e. drainage ditches).
c) Any navigable inland lake located wholly or partly in any county having a population of 750,000 or more (the exemption applies to the entire lake regardless of the county it is located in).
d) Those portion of navigable streams, Lake Michigan or Lake Superior within any county having a population of 750,000 or more.
e) Any work required to maintain the original dimensions of an enlargement of a waterway authorized under (a) or (b).

2. See **NR 340.035 Exemption.** NR 340 does not apply to nonmetallic mining operations of less than 1 acre where the department determines that there is little likelihood for adverse environmental effects. Permits under 30.19 are still required where applicable.

3. Artificial private ponds not connected or ultimately connected (the connection is non-navigable) to a navigable waterway, no prior waterway history, have not acquired prescriptive rights, have no legal access and were constructed prior to 1963 are PRIVATE waterways regardless if they are navigable or not. However enlargements to a private artificial waterway where the activity is within 500 feet of an existing public waterway or ultimate connections to a public waterway after 1963 are regulated under s. 30.19 and would become public if authorized between 1963 and 1988.

4. Municipal or industrial wastewater treatment facilities with exception to cooling ponds are not subject to s. 30.19. (see chapter 1 00, Water Reg guidebook, BLS opinion - 7/16/76)

Legal Prohibition for authorizing an activity under 30.19

1 . See **NR 301.04. Relationship of enforcement and permit proceedings.**
(1) The department shall not process After-the-fact permit or approval applications prior to completing enforcement actions if:
   a) The project is causing or is likely to cause environmental damage; or
   b) Department staff have an objection to the issuance of the permit or approval; or
   c) The prosecuting attorney in the enforcement action has not given consent to the processing of the application prior to the completion of the enforcement action.

2. See **NR 302.04 Wild Rivers Alterations. (1)** no man-made dams or other man-made structures which impound water shall be permitted on the Pike River in Marinette County and the Pine River and Popple River in Florence and Forest County with the exception of projects licensed by FERC and in existence prior to November 18, 1965. (3) Channel Changes, Enlargements, Dredging and Grading. No channels shall be connected to a wild river, nor shall any pond or enlargement be permitted within 400 feet of the OHWM of any wild river.

3. See **s. 30.25 Wolf River Protection.** No person may make any effort to improve the navigation of the Wolf River north of the southern boundary of Shawano County nor shall any dam be authorized for construction in that portion of the Wolf River. Any order or law authorizing the construction of a dam in the Wolf River in Langlade County is void.

4. See **s. 30.44 (3e) Nonmetallic mining** within the Lower Wisconsin State Waterway. (if the mining activity were subject to s. 30.19 permit requirements the criteria in this section must also be met before it can be permitted.)

<u>Recent Policy Issues</u>

1 . Ponds authorized under s. 30.19 that are ultimately connected and have a continuous flow or discharge should be declared public as a condition of the permit.
2. Dry stormwater management ponds, located within 500 feet of a navigable waterway should not be regulated under 30.19 unless the activity exceed the grading requirements.

DATE: September 5, 2002

Insert: CHAPTER 100
Waterway and Wetland Handbook

TO: Water Management Specialists
Water Management Engineers
Regional Aquatic Habitat Experts
Regional Fisheries Experts
Bureau of Fisheries Management and Habitat
Protection – Rivers and Habitat Protection Section

SUBJECT: **Guidance for "After-the-fact" Construction Permits for Fish Farm Ponds**

This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule apply. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance cannot be relied upon and does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decision made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

Summary of Guidance

Fish farmers may seek to obtain an "after-the-fact" permit under Chapter 30 or 31, Wisconsin Statutes or an after-the-fact Water Quality Certification under NR 299, Wisconsin Administrative Code, for an artificial waterbody that has been historically operated as a fish farm. If an "after-the-fact" permit is issued for the fish farm waterbody(s), and the waterbody is not declared public under ss. 30.19(5), Stats. then the fish farm can be exempt from the Natural Water Body permit requirements of NR 16, Admin. Code. This guidance clarifies the permitting procedures and statutory and administrative standards for reviewing after-the-fact permits and certifications for fish farm waterbodies.

Note: Only a minimal number of these after-the-fact applications are anticipated, but fish farmers may inquire or choose to exercise this option to avoid NR 16 requirements in perpetuity. This procedure does not apply to naturally-existing navigable waterways, which are constitutionally public waters and cannot be deemed private by any permit.

Background

In the 1997-1999 Budget bill, DNR licensing of private fish hatcheries was transferred to a DATCP fish farm registration program, which largely removed DNR oversight of fish farms. However, the same legislation also created a new "use" permit in section 29.733, Stats., which requires fish farmers to obtain a permit in order to use a natural body of water as a fish farm. In response to this statute, DNR promulgated NR 16, Admin. Code, Subchapter II - "Permitting the Use of Natural Bodies of Water as Fish Farms". Effective with a July 1, 2002 rule revision, NR 16 defines "natural body of water" as:

> "any spring, stream, pond, lake or wetland that was historically present in a natural state but may have been physically altered over time except any waterbody that has been permitted by the department under ch. 30 or 31, Stats., or ch. NR 299 water quality certification and not declared public under s. 30.19(5), Stats."

Eligibility of a Fish Farm Pond for NR 16 Exemption

In practicality, there are two ways a fish farm may be exempt from the permit requirements of NR 16:

1. If the waterbody was not historically present as a spring, stream, pond, lake or wetland, then the waterbody does not meet the definition of a "natural body of water". Fish farming in this type of waterbody is exempt from the NR 16 permit requirement.
2. If the waterbody has been permitted and not declared public as a condition of the permit, then the waterbody does not meet the definition of a "natural body of water." Accordingly, fish farming is exempt from NR 16 in any waterbodies that have the following permits:
   a) A chapter 30 permit for an unconnected or ultimately-connected pond, where the pond was not declared public pursuant to s. 30.19(5), Stats., as a condition of the permit;
   b) A chapter 31 dam plan approval on a non-navigable stream issued pursuant to s. 31.33, Stats.; or
   c) An NR 299 Water Quality Certification for a pond constructed in a wetland, where certification is required pursuant to Section 404, Clean Water Act and s. 281.37, Stats. (federal wetlands) or s. 281.36, Stats. (nonfederal wetlands).

Reminder, if a fish farmer wants to operate in a natural waterbody, they must either obtain a permit or certification that does not declare the constructed waterbody to be public, or they must obtain an NR 16 Natural Water Body permit to legally operate as a fish farm.

Review of "After-the-fact" Application for a Waterbody Historically Used as a Fish Farm

Applicable Statutes and Administrative Codes: After-the-fact (ATF) permit procedures and standards are set forth in the following statutes and administrative codes:

- Section 30.19, Stats., specifies the requirements and standards for permit issuance of unconnected, ultimately-connected, and connected enlargement waterway permits. For more information and a list of applicable codes, see Chapter 100 of the Waterway and Wetland Handbook, available on the Internet at http://www.dnr.state.wi.us/org/water/fhp/handbook/PDFs/ch100.pdf.
- Chapter 31, Stats., provides requirements for various types of dam permits and approvals. For more information and a list of applicable codes, see Chapter 140 of the Waterway and Wetland Handbook, available on the Internet at http://www.dnr.state.wi.us/org/water/fhp/handbook/PDFs/ch140.pdf.
- Section 404 of the Clean Water Act, s. 281.37 (federal wetlands) and s. 281.36, Stats. (non-federal wetlands), NR 299 and NR 103, Admin. Code, outline the requirements for Wetland Water Quality Certifications.
- Section 30.28(2m)(b), Stats. and NR 300.06(5), Admin. Code, require the Department to charge twice the permit fee for projects that are started or completed without an application for permit or approval being submitted.
- NR 301, Admin. Code, prohibits the Department from processing ATF permits prior to completing enforcement actions under a number of scenarios (see NR 301.04 for specifics).

Permit Fee: If the fish farm ponds or waterbodies were constructed prior to specific regulations that required a permit or approval from the Department, the waterbodies are generally considered legally-constructed and no permit is required. So if the fish farmer voluntarily subjects himself or herself to the current permit requirements and submits an application for an ATF permit, the normal permit fee is applicable. On the other hand, if the fish farm ponds or waterbodies were constructed after the specific regulations were passed that required a permit, then the statute is clear that "twice the permit fee" is charged.

The following dates and fees are applicable:

- After July 27th, 1961 all connected enlargements of navigable waterways required Department approval. As of March 2002, the permit fee is $500, or $1,000 for double fee.
- After September 12, 1963 all unconnected ponds within 500 feet of a navigable waterway and all ultimately-connected ponds required Department approval. As of March 2002, the permit fee for an unconnected pond, not in a wetland, is $50, or $100 for double fee. The permit fee for an unconnected pond located in a wetland, or an ultimately-connected pond, is $300, or $600 for double fee.
- Wetland Water Quality Certification – As of March 2002, the permit fee is $300, or $600 for double fee.

Note, if an original pond or waterbody was built prior to the creation of section 30.19, Stats., but has since been modified without necessary permits (e.g. under 30.19 or 30.20, Stats.), the ATF permit application should be considered to be filed after statutory jurisdiction.

Navigability Determination: If an ATF permit application is submitted, the navigability determination should be made based upon current statutory and common law requirements. Under Turkow v. DNR, 216 Wis. 2d 273 (1998), the court concluded that the Department has the "authority, as well as the obligation," to determine whether the waters of the state are navigable in fact and therefore subject to regulation. Where the PSC had made a determination historically that this stream was not navigable, it was not "estopped" (legally precluded) from reviewing that determination to make a contemporary jurisdictional determination.

Completeness Review: Depending on the statutory authority for a given application, within 30 or 60 days from the date of receipt, the Department will review the application and provide notice to the applicant of any additional information required to complete the application. Once the application is deemed complete, the Department may not refund the permit fee (NR 300.06(4), Admin. Code). However, the applicant may, at any time before the Department completeness decision, request the application to be withdrawn.

Permit Decisions

For ATF review of ponds or waterbodies under section 30.19, Stats., the decision options are different for ponds or waterbodies constructed prior to permit requirements, compared to those constructed after permits were required by statute.

Ponds and Waterbodies Constructed prior to Statutory Jurisdiction

Since ponds and waterbodies constructed prior to the creation of section 30.19, Stats. are considered legally-constructed, then a voluntary ATF permit application may not be denied – it may only be granted or dismissed.

1. If the legal standards and requirements for such a legally constructed pond or waterbody are not met, then the application should be dismissed. Similarly, for those applications where the legal standards are met and a permit could be issued, but in order to protect the public interest the permit will declare the pond or waterway public under ss. 30.19(5), Stats., the application should also be dismissed.
2. For those applications where the legal standards are met, a permit will be issued, and the permit will not declare the pond or waterbody to be public – draft the permit including conditions and findings of fact. Provide the draft permit to the applicant for their review and comment, prior to issuance of the permit. If the applicant does not agree with the permit conditions, they may request the permit application be dismissed.

Ponds and Waterbodies Constructed after Statutory Jurisdiction

All ponds or waterbodies constructed after the creation of section 30.19, Stats., require statutory approval, so any application must be either approved or denied. If a fish farmer does not want to file an ATF application, or requests dismissal of an ATF permit application for a pond or waterbody that is subject to statutory jurisdiction, enforcement action may be appropriate. In deciding whether to proceed with enforcement, staff will want to consider many factors including: the date of construction; the severity of the unpermitted activity; past, present and potential impacts to the public interest; and whether DNR historically authorized the facility as a private fish hatchery.

Permit Findings and Conditions

If an ATF permit or certification is granted for a fish farm pond or waterbody, you may wish to include supplemental findings and conditions as appropriate. Important issues could include statements about the waterbody(s) not being public water; about the facility being exempt from NR 16 if the waterbody(s) and operations are not changed; about the potential need for new permits if any changes are proposed to the facility or operation; and references to other statutory requirements related to fish farming, such as fish barriers and restrictions on importation of fish. Consult with your fisheries biologist in each case, and contact the Bureau of Fisheries Management and Habitat Protection for sample findings, conditions and other recommendations.

Existing Permits

If a constructed waterbody has already been permitted and the permit declared the waterbody to be public, an individual desiring to start a new fish farm may contact the department asking for a permit modification to allow their waterbody to be considered private. Any such request should be evaluated consistent with current law and program guidance.

Drafted by Liesa Nesta
Approved by Aquatic Habitat Coordinators – June 10, 2002

Approved: _____ on 11-22-02
Mary Ellen Vollbrecht, Section Chief *Date*

Approved: _____ on 11-22-02
Michael Staggs, Bureau Director *Date*

Approved: _____ on 11-26-02
Michael Cain, Legal Services *Date*

Approved: _____ on 11-26-02
Susan Sylvester, Division Administrator *Date*